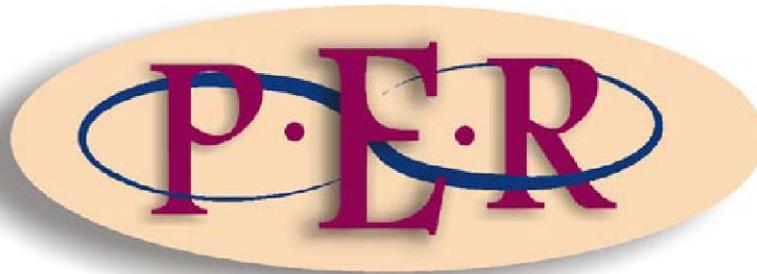


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REGULATING TRADITIONAL JUSTICE IN SOUTH AFRICA: A COMPARATIVE ANALYSIS OF SELECTED ASPECTS OF THE *TRADITIONAL COURTS BILL*

CB SOYAPI*

1 Background

Customary law¹ is without doubt the oldest system of law in most African societies. These societies were communal, with their headmen, chiefs and kings as the leaders. The administration of justice within these societies lay in the hands of the traditional leaders.² Within such a structure, a feature which was predominant in customary practices was patriarchy.³ In other words, traditional leadership was male dominated and in the traditional justice administration the difference between men and women was apparent.

With the arrival of colonialism in South Africa the nature of traditional court structures was changed. On the one hand there was the African customary law practised among black South Africans, and on the other the Western justice system which was applicable to all races. In order to formalise and regulate the interaction between the two systems, the *Black Administration Act*⁴ was introduced in 1927. This Act, among other things, legitimised the application of customary law among black South Africans and enabled the country's courts to give recognition to it. The Act brought a system of control over the manner in which the customary courts functioned. The courts were divided into courts of chiefs and courts of headmen, with the result that there was a system of hierarchy put in place specifically for Africans. Khumalo⁵ posits that during the administration of traditional justice any

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¹ Lehnert 2005 *SAJHR* 242. It is defined as a law that derives from social practices that the community concerned accepts as obligatory and normative in nature. See Bennett *Customary Law* 1.

² Bennett *Human Rights and African Customary Law* 76.

³ A patriarchal society is one in which men are superior to women and are the leading figures in almost every facet of that society. Bennett *Human Rights and African Customary Law* 80.

⁴ *Black Administration Act* 38 of 1927 (hereafter the *Black Administration Act*).

⁵ Khumalo *Civil Practice of All Courts* 2.

adult male could cross-examine witnesses, as there were no strict rules on evidence. This goes to show that the proceedings were informal. However, this in no way meant that the justice delivered in such customary courts was not to the satisfaction of the parties.⁶ The colonisers allowed the courts to use any procedure as long as their proceedings did not disrupt public policy and justice.⁷

However, with the advent of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*), South Africa has taken a new direction in the manner in which traditional leadership, women and customary courts are viewed. The legislature has enacted laws that are aimed at redressing the past and redefining traditional leadership and traditional courts.⁸ The *Constitution* itself recognises customary law and customary courts. The recognition necessitates legislative measures to integrate this form of justice into the mainstream. However, the same *Constitution* contains provisions that do not immediately lend themselves to the smooth accommodation of customary law. Therefore, with specific reference to traditional courts, the legislature has been trying to enact a Bill⁹ that is going to regulate the traditional justice system. The Bill has, however, not been well received as it has attracted criticism from civil groups,¹⁰ academics¹¹ and parliamentarians/politicians.¹² Some of the reasons for this criticism are that the legislature has ignored the recommendations made by the South African Law Reform Commission¹³ and the Bill also ignores fundamental issues that are central to

⁶ See Bennett *Customary Law in South Africa* 166.

⁷ Olivier *et al Indigenous Law* 192.

⁸ See the *Traditional Leadership and Governance Framework Act* 41 of 2003 and the *Traditional Courts Bill* [B1-2012].

⁹ The *Traditional Courts Bill* [B1-2012].

¹⁰ These include the Legal Resource Centre and the Lesbian and Gay Equality Project.

¹¹ See Claassens 2009 *Agenda* 11-20; Weeks 2011a *SA Crime Quarterly* 3-5; Gasa 2011 *SA Crime Quarterly* 24-26; Williams and Klusener 2013 *SAJHR* 277-291.

¹² Makinana 2013 <http://mg.co.za/article/2013-10-17-traditional-courts-fracas-goes-on>. The Bill has been rejected by Parliament and sent back to the provinces for consideration and revision. Its status at the moment is uncertain as the press has written that it has been withdrawn while Parliament denies this. See Mtyala 2014 <http://www.timeslive.co.za/thetimes/2014/02/28/anger-as-traditional-courts-bill-jettisoned>; Anonymous Traditional Courts Bill not withdrawn: justice department <http://www.timeslive.co.za/politics/2014/02/28/traditional-courts-bill-not-withdrawn-justice-department> [date of use 01 May 2014].

¹³ SALC *Report on Traditional Courts*. For instance, the failure to recognise the hierarchy of courts, the failure to recognise councillors, the failure to provide for gender representation and the failure to provide for opting out of the jurisdiction of the court.

traditional justice such as ascertainment, legal representation, jurisdiction, gender and the hierarchy of courts.¹⁴ Where it addresses these issues, the Bill does so inadequately. This is untenable considering the fact that the traditional courts are responsible for administering justice in the majority of cases involving the majority of South Africans, who cannot access the formal courts.¹⁵

The post-apartheid government of South Africa has the opportunity to legislate on the traditional justice system which has been regulated thus far through the *Black Administration Act*. With this opportunity the government has the task of bringing the traditional justice system in line with the *Constitution*, but it needs to tread carefully in order that the process does not destroy the institution of traditional leadership.

This note places the Bill into perspective and analyses it within the broader context of the myriad of challenges that legal plurality poses in the development of a justice system. In that regard, the principal aim of this note is to identify the flaws in the Bill which have caused opponents to label it as unconstitutional and to analyse the impact of such issues on the Bill. The ancillary aims are to draw comparisons between the Bill and similar provisions in other African countries which regulate traditional justice, and to formulate and recommend the best possible ways to address the flaws in the Bill.

2 Traditional courts and their functioning

Traditional justice affirms the values of customary law and is deeply rooted in the principles of restorative justice and reconciliation.¹⁶ As such, traditional courts are an indispensable part of the administration of justice in South Africa.¹⁷ Although they

¹⁴ The Bill has been met with criticism on other grounds as well. However, the note focuses on the above-mentioned aspects only. For other contentious issues relating to the Bill, see Weeks 2011a *SA Crime Quarterly* 3-5; Gasa 2011 *SA Crime Quarterly* 24-26; Williams and Klusener 2013 *SAJHR* 277-291; Claassens 2009 *Agenda* 11-20.

¹⁵ McQuoid-Mason 2013 *Oñati Socio-legal Series* 573. Weeks estimates that there are approximately 17 million people who rely on these courts. See Weeks 2011b *SA Crime Quarterly* 31.

¹⁶ Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 17.

¹⁷ A related issue is a discussion of whether or not traditional courts are real courts of law. Koyana argues that they are courts of law as customary law is recognised as law and the people

are not recognised as forming part of the formal courts, they occupy an important space in the administration of justice in rural areas, where a huge percentage of the population of South Africa is located.¹⁸ The African Human Security Initiative¹⁹ has observed that traditional courts have the following strengths:

- (i) There is a sense of ownership by the people as the community is bound by its rules. The people are more comfortable because they are included in the process and are under a law that is indigenous and not foreign.
- (ii) The processes are flexible, simple and familiar, with no rigid rules. The language is not foreign and people can easily follow the process. It has also been found that the informal procedures of customary courts have the advantage of leaving less room for technicalities and having the real substance dealt with.²⁰
- (iii) The system is based on mediation and is more restorative than retributive.²¹ In this regard, the community is more important and relations are meant and expected to exist after the process. There is, thus, a measure of bringing unity and togetherness.
- (iv) The courts are accessible, inexpensive and speedy. It is important that by virtue of their being geographically closer to the people there are often no travelling costs involved.

On the other hand, some major disadvantages of these courts are the following:

- (i) There is no presumption of innocence²² as the inquisitorial nature of the proceedings amounts to a presumption of guilt against the accused because he

presiding within these courts derive their authority from customary law. See Koyana "Traditional Courts in South Africa" 227.

¹⁸ McQuoid-Mason 1999 *Windsor YB Access Just* 1.

¹⁹ AHSI *Criminal Justice System in Zambia* 140-141.

²⁰ *Bangindawo v Head of the Nyanda Regional Authority* 1998 3 SA 262 (Tk). Also see Harper *Customary Justice* 19, where it is argued that these courts are dynamic and have a flexible operating modality.

²¹ Harper *Customary Justice* 21.

²² Koyana "Traditional Courts in South Africa" 232.

has to prove his innocence, which is a violation of section 35(3)(h) of the *Constitution*.²³

- (ii) The process is said to be patriarchal²⁴ because males are considered to be superior. Women are therefore thought to be inferior, and when it comes to the determination of issues that have to do with the household, the man is the head. Matavire notes that during court proceedings it is very common to hear the men saying that they do not "tolerate womanish talk" when discussing crucial matters and "if you don't have anything to say you can join the women in the kitchen".²⁵

This kind of talk is indicative of the way women are viewed. It goes beyond looking down upon them to even considering them thoughtless and subordinate.²⁶ As will be seen hereunder,²⁷ the Bill does not provide guidance on how gender will be addressed and how these past practices can be avoided.

Boko²⁸ is of the opinion that justice rushed is justice delayed. He takes the route that because the trials are speedy and because there is no legal representation, the kind of justice produced leaves much to be desired. Boko therefore seems to assume that the justice delivered by the traditional courts is not wholesome, because there is no legal representation. With respect, the argument fails to appreciate the fact that traditional courts existed long before the concept of legal representation came with colonialism. As a result, even though legal representation is a precept that is now widely accepted as the right of every accused person, the lack thereof in traditional justice cannot be a yardstick by which such justice is measured.

²³ See Bennett *Customary Law in South Africa* 78.

²⁴ SALC *Report on Traditional Courts* 10.

²⁵ Matavire 2012 *IJHSS* 220. She further notes that having a woman as a chief in the name of human rights is considered taboo. Their superiority is important to the men, and the women are accustomed to being thought inferior to their husbands.

²⁶ Matavire 2012 *IJHSS* 220. She also refers to a court case where a woman was refused a divorce after the man had moved to the city and begun to live with another woman, whilst the couple's child was being abused. The customary court found that the woman had no grounds for divorce as polygamy was allowed in the African custom and that if she decided to leave she would lose what the couple had accrued together.

²⁷ See part 5 of the note.

²⁸ Boko 2000 *Criminal Law Forum* 445-460.

3 The legislative efforts to address traditional justice

The starting point for any discussion on any legislation should be the *Constitution*.²⁹ The *Constitution* sets the basis for any legislation, and the *Traditional Courts Bill* must therefore not be in conflict with the *Constitution*. When it comes to courts in general, the *Constitution* recognises the existence of higher courts and lower courts, including any court established by an Act of Parliament. Consequently, the question is whether the traditional courts will be recognised as courts established by an Act of Parliament or as other courts not recognised as formal courts, as the former recognition would have legal implications. For example, issues like the role of legal representation and the effect of a conviction in such courts would have to be addressed.³⁰

However, before any discussion of the *Traditional Courts Bill* is undertaken, it is important to put the *Traditional Leadership and Governance Framework Act*³¹ into context. This Act recognises the offices which have traditionally been involved in the facilitation of traditional justice systems. It recognises kings, queens, principal traditional leaders, senior traditional leaders, headmen and headwomen.³² Section 19 of the Act specifically indicates that traditional leaders (listed in section 8) have the major functions as provided for in customary law and the customs of their respective communities. Once again it is acknowledged that the facilitation of justice is a core function of traditional leaders. What it boils down to is that the *Traditional Leadership and Governance Framework Act* is an enabling piece of legislation that recognises, affirms and legitimises the function of traditional leadership in communities. It is a positive step in the mandate of the government in terms of the *Constitution*,³³ which requires that the institution, status and role of traditional

²⁹ The reason is that s 2 of the *Constitution of the Republic of South Africa, 1996* asserts that the *Constitution* is the supreme law of the land.

³⁰ If the traditional courts are not recognised as courts established by an Act of Parliament, the effect of their judgments will also need to be clarified.

³¹ *Traditional Leadership and Governance Framework Act* 41 of 2003 as amended by the *Traditional Leadership and Governance Framework Amendment Act* 23 of 2009.

³² S 8 of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

³³ See s 212 of the *Constitution*, which provides that national legislation may be enacted to provide for the role of traditional leadership as an institution.

leaders are recognised subject to the *Constitution*³⁴ and also function subject to any applicable legislation.³⁵

The *Traditional Courts Bill* has been a recent effort to regulate specifically on traditional justice. Its purpose is to create a uniform legislative framework regulating the role and functions of the institution of traditional leadership in the administration of justice in accordance with constitutional imperatives and values.³⁶ It has been noted that the lack of regulation in customary procedures may well appear as a shortcoming,³⁷ as these systems come from a history that has not been kind to the manner in which women and authority were handled. This has prompted the legislature to attempt the regulation of traditional justice.

The following sections deal with the contentious issues mentioned above, and which require amendment before the Bill can be passed.

4 Ascertainment, legal representation and jurisdiction

Ascertainment can generally be referred to as the process of identifying a particular customary law. The ascertainment of customary law is important because it offers insight into the very essence of what customary law is. It is through ascertainment that a rule is found to be consistent or identifiable. As indicated hereunder, the Bill does not seem to pay adequate attention to ascertainment, thereby hampering its application in the fluid South African society.

The Bill prohibits legal representation in the traditional court. This is problematic as the traditional court is envisaged to have criminal jurisdiction.

4.1 Ascertainment

The *Constitution* notes that every individual has a right to participate in and practise a culture of his/her choice.³⁸ This right extends to every individual of every race. As

³⁴ See s 211(1) of the *Constitution*.

³⁵ See s 211(2) of the *Constitution*.

³⁶ See s 2(c) of the *Traditional Courts Bill* [B1-2012].

³⁷ Bennett *Customary Law in South Africa* 168.

³⁸ Ss 30 and 31 of the *Constitution*.

such, without clarity on ascertainment, it is inevitable that there will be disagreements in the process of determining a specific custom applicable to a particular case. The *Traditional Courts Bill*, surprisingly, does not have a section dedicated to explaining how ascertainment will be done, despite the fact that the country does not have a uniform system of customary law.³⁹ The Bill does not contain guidelines as to how the traditional courts should settle disputes concerning the existence of a custom. It does, however, provide that the parties can agree to the use of a specific customary law in the courts where two or more customary laws apply.⁴⁰ In the event where there is no agreement, the court is required to use the customary law applicable in its jurisdiction⁴¹ or the customary law of the place where the issues or the persons have their closest connection.⁴² Although clear in their objectives, these provisions are inadequate. Given the multicultural society most South Africans find themselves in, there are bound to be differences in understanding and identifying customs.⁴³

By way of comparison, other African states have promulgated more extensive provisions on ascertainment. They emphasise the need for clarity on ascertainment, its significance and the need for legislative guidelines in achieving it. Consequently, examples from these foreign jurisdictions seem valuable.

The *Customary Law Act*⁴⁴ of Botswana indicates that in the process of ascertainment, the court must first hear the customary law or rule that is in issue and that both parties are to submit their understanding on the rule. If the court is in doubt, it is obliged to consult reported cases, text books, opinions in writing or submitted orally, and any other source that might provide clarity.⁴⁵ The section goes further by providing that when it comes to opinions consulted, the final decision lies with the court. It also provides that any material consulted by the court is to be

³⁹ Bennett "Conflict of Laws" 25.

⁴⁰ See s 9(a) of the *Traditional Courts Bill* [B1-2012].

⁴¹ See s 9(4)(a) of the *Traditional Courts Bill* [B1-2012].

⁴² See s (9)(4)(b)(i)-(ii) of the *Traditional Courts Bill* [B1-2012].

⁴³ See Gasia 2011 *SA Crime Quarterly* 27. Himonga "Future of Living Customary Law" 50 argues that the ascertainment of customary law is not an easy process in itself.

⁴⁴ *Customary Law Act* 51 of 1969.

⁴⁵ See s 11 of the *Customary Law Act* 51 of 1969.

provided to the parties for their perusal.⁴⁶ Arguably this is to enable the parties to understand how and why the court will arrive at a particular decision regarding ascertainment or the rejection of a particular rule or practice.

Across the border, the Zimbabwean provision on ascertainment has the same wording as that of the *Customary Law Act* of Botswana. This simply indicates the context in which Africans find themselves, as they have a shared and almost similar experience of history. The *Customary Law and Local Courts Act*⁴⁷ provides for the presiding officer to consult other sources in the event where there is a rule or practice in issue.⁴⁸

The Namibian provision is also similar to the provisions of the Botswana and Zimbabwean legislation. The only difference is that there is no provision for the court to have a discretion in the acceptance or rejection of evidence received in the process of ascertainment.⁴⁹

It is clear that certain African jurisdictions have dedicated an entire section to dealing with the issue of ascertainment. The omission of such in the South African Bill is a flaw which should be amended if the Bill is to be passed. Without that, it is unclear what guidelines are to be followed in ascertaining a custom for the purposes of adjudication. The legislature must also take the living customary law into account, as customary law is not stagnant but develops with time. The Constitutional Court put it correctly by concluding as follows:

To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights.⁵⁰

The above proves the importance of the recognition of living customary law in any ascertainment of law. A telling argument proffered is that the centralisation of power

⁴⁶ Such material includes textbooks, cases and any other consulted sources.

⁴⁷ *Customary Law and Local Courts Act* 2 of 1990.

⁴⁸ See s 9 of the *Customary Law and Local Courts Act* 2 of 1990.

⁴⁹ See s 14 of the *Community Courts Act* 10 of 2003.

⁵⁰ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) 49.

in one person, the presiding officer, is a travesty, as it would hamper the development of living customary law.⁵¹ This argument is true if regard is had to the fact that living customary law is adaptive to the socio-economic and political conditions of society as a whole.⁵² The Bill in its present form does not give due consideration to living customary law. In fact, it does not provide for its recognition at all. This is a flaw that is present not only in the Bill but also in the legislation of Zimbabwe, Botswana and Namibia cited above.⁵³

4.2 *Legal representation*

The Bill excludes legal representation in the traditional courts⁵⁴ despite the fact that legal representation is a right of an accused which is entrenched in the South African *Constitution*.⁵⁵ Consequently, the main question is whether it is justified for the *Traditional Courts Bill* to limit the constitutionally entrenched right of an accused to legal representation. Before answering this question it is apposite to have a brief look at other jurisdictions which deal with legal representation in traditional justice.

In Botswana the rule is explicit that no legal representation is allowed in traditional courts, inclusive of cases where the matter goes on appeal to the Magistrates' Court.⁵⁶ In Zimbabwe legal representation is not allowed at all and the presiding officer is supposed to conduct the proceedings in a loose and simple fashion.⁵⁷ The position in Namibia is not particularly clear as the text reads that anyone can appear in person or may be represented by any person of his/her choice.⁵⁸ It does not clearly state whether legal practitioners are allowed or not. It is for that reason that Hinz⁵⁹ notes that it is interpreted to mean that a legal representative is allowed, as

⁵¹ Weeks 2011b *SA Crime Quarterly* 33.

⁵² Himonga "Future of Living Customary" 35. She argues that living customary law is observed by the community.

⁵³ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) 46. The court says the following: "Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred".

⁵⁴ See s 3(a) of the *Traditional Courts Bill* [B1-2012].

⁵⁵ S 35(3)(h) of the *Constitution*. It is considered to be a requirement for a fair trial.

⁵⁶ See s 32 of the *Customary Courts Act* Proc 19 of 1961.

⁵⁷ See s 20 of the *Customary Law and Local Courts Act* 2 of 1990.

⁵⁸ See s 16 of the *Community Courts Act* 10 of 2003.

⁵⁹ Hinz *Traditional Courts in Namibia* 161

the Namibian *Constitution* provides. This deduction is based on the wording of the provision itself. If the legislature had not envisaged the participation of legal representatives, it would have stated it expressly. However, Hinz notes that traditional leaders generally oppose legal representation because legal representatives do not understand the procedures of tradition and would only disturb them.⁶⁰

Locally, the South African legislature has always denied lawyers the right to appear in traditional courts. The Bill also contains a provision that denies an accused the right to legal representation.⁶¹ In view of that, the Legal Resource Centre concluded that it understood the need for informality for which legal representation is excluded, but submitted that the exclusion was still in contravention of the *Constitution*.⁶² Yet, in order to fully comprehend the implications of the limitation of the right to representation, one has to understand how the issue of jurisdiction is addressed in the Bill.

4.3 *Jurisdiction*

Jurisdiction is the power of a court to make judicial decisions and also the power to adjudicate over disputes.⁶³ There are two types of cases that are handled by the courts, namely criminal and civil cases. The former are conducted by the state in mainstream courts while the latter are primarily between private individuals. In traditional justice systems before colonialism, traditional leaders presided over both without much difference,⁶⁴ as they never made a clear distinction between civil and criminal matters.⁶⁵ In this note it is postulated that in order to fully appreciate the implications of the issues of jurisdiction, its analysis must be considered together with the issue of legal representation.

⁶⁰ Hinz *Traditional Courts in Namibia* 161.

⁶¹ See s 3(a) of the *Traditional Courts Bill* [B1-2012].

⁶² LRC 2008
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/200005pcsubmission080514lrc.pdf14.

⁶³ Blackwell *Essential Law Dictionary* 273.

⁶⁴ Olivier *et al Indigenous Law* 191-192.

⁶⁵ Koyana, Bekker and Mqeke "Traditional Authority Courts" 144.

Comparatively, section 12(4) of the *Customary Law Act* of Botswana provides that in a criminal trial the prosecutor can be the person bringing the matter, the Director of Public Prosecutions or a person authorised by him. The perplexing issue is why the Director of Public Prosecutions is allowed to prosecute when lawyers are denied the right to represent their clients? It is argued that this situation reflects badly on South Africa, because for all intents and purposes, prosecutors are lawyers.

In Namibia the *Community Courts Act*⁶⁶ appears to give jurisdiction to traditional courts in both civil and criminal matters. The provision states that community courts have jurisdiction to hear a claim relating to compensation, restitution and any other claim recognised by customary law. Moreover, although not explicit from the provision itself, Hinz⁶⁷ notes that these courts deal with attempted rape cases and that this amounts to criminal jurisdiction. However, in Zimbabwe the legislation is clear in that customary law is applicable only in civil cases.⁶⁸ Customary courts have no criminal jurisdiction, irrespective of how trivial the criminal matter may be.

The *Traditional Courts Bill* extends jurisdiction to traditional courts in both civil and criminal cases⁶⁹ and also provides that an order of a traditional court is final, except when it is taken on appeal or review.⁷⁰ The extension of civil and criminal jurisdiction is in accordance with the standing practice within the traditional courts. However, it is submitted that this position can no longer be legally justified. If the Bill is to adhere to its guiding principles,⁷¹ then criminal jurisdiction should be removed from the traditional courts.⁷² No matter how small the matter is and no matter how trivial

⁶⁶ *Community Courts Act* 10 of 2003.

⁶⁷ Hinz *Traditional Courts in Namibia* 172.

⁶⁸ See s 3(1)(a) of the *Customary Law and Local Courts Act* 2 of 1990.

⁶⁹ See ss 5 and 6 of the *Traditional Courts Bill* [B1-2012]. S 5 lists the civil issues which the traditional court may not try, whereas s 6 limits the crimes to those listed in the Schedule. These courts used to preside over both civil and criminal cases even before the Bill. See Olivier *et al Indigenous Law* 191.

⁷⁰ S 12 of the *Traditional Courts Bill* [B1-2012].

⁷¹ S 3(1) *Traditional Courts Bill* [B1-2012] provides that "In the application of this Act, the following principles should apply:

(a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including –

(i) the right to human dignity;

(ii) the achievement of equality and the advancement of human rights and freedoms".

⁷² See Williams and Klusener, who argue that the legislature has the authority to include or exclude legal representation only in civil cases. They argue that if these courts are to hear criminal cases,

it might seem, if it counts as a previous conviction (*autrefois convict*), then indeed representation is necessary. If a person has to stand as an accused before the traditional courts and the outcome can be used against him/her as a previous conviction, there is no legal basis to justify the denial of legal representation.⁷³

5 Gender, hierarchy of courts and appeals

The Bill makes provision for gender representation and the structure of courts. Although covered by the Bill, these issues are not thoroughly addressed. Gender remains an undeniably contentious attribute of traditional justice and the administration of justice in the traditional court. It is therefore not surprising that many detractors of the Bill premise their objections on gender.⁷⁴ On the other hand, regarding the structure of the courts, a hierarchy is an integral part of any system of justice, in order that the finalisation of a decision may be left to a further and/or superior forum whenever a party is not satisfied with an outcome. In terms of the *Black Administration Act*, the Magistrates' Courts fulfil this function in respect of customary courts.

5.1 Legislative framework on gender

The *Constitution* provides that everyone is equal before the law. It entrenches the right to equality⁷⁵ and does not allow discrimination on various grounds, but for the purposes of this note, the issue is the prohibition of discrimination on the grounds of gender.⁷⁶ It is a legal requirement that if any legislation includes provisions relating to the distinction between men and women, it has to observe and adhere to the requirement of equality.

the legislature is obliged to include legal representation in the Bill. Williams and Klusener 2013 *SAJHR* 188.

⁷³ Weeks argues that given the powers of the presiding officers in giving out sanctions, it is alarming that legal representation is excluded. See Weeks 2011a *SA Crime Quarterly* 6. Some sanctions included in the Bill include ordering a party to the dispute to perform some service without remuneration (s 10(2)(g), depriving a party of benefits due under customary law (s 10(2)(i) and any order deemed appropriate (s 10(2)(l)).

⁷⁴ For a general overview of the discussion on gender as presented in the Bill, see Claassens 2009 *Agenda* 11-20; Weeks 2011a *SA Crime Quarterly* 3-5; Gasa 2011 *SA Crime Quarterly* 24-26; Williams and Klusener 2013 *SAJHR* 277-291.

⁷⁵ See s 9 (1) of the *Constitution*.

⁷⁶ S 9(3) and (4) of the *Constitution*.

Furthermore, the *Traditional Leadership and Governance Framework Act* constitutes additional authority as to how the issue of gender is to be addressed. It is clear from the wording of section 2 of the Act that there should be an adaptation and transformation of customary law and customs in order to prevent unfair discrimination. Moreover, it promotes equality as well as a progressive advancement of gender representation.⁷⁷ The Act further gives a statement of intention by establishing a mathematical breakdown of its gender requirements by requiring that a third of the members of a traditional council must be women.⁷⁸ It is submitted that these are legal requirements which the framers of the *Traditional Courts Bill* cannot ignore. Moreover, given the gender related issues/problems in traditional systems, the legislature is compelled to frame the Bill in such a manner as to address the injustices that have been there or are likely to occur.

5.1.1 Gender as presented in the Traditional Courts Bill

Gender is a very sensitive issue when it comes to traditional systems, as such societies have always been patriarchal.⁷⁹ The Bill has not done justice to this issue.⁸⁰ The references to gender are in the guiding principles, where the following is provided for:

- the achievement of equality and the advancement of human rights and freedoms;⁸¹
- non-racialism and non-sexism;⁸²

⁷⁷ *Traditional Leadership and Governance Framework Act* 41 of 2003 s 2(3): "A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-
(a) preventing unfair discrimination;
(b) promoting equality; and
(c) seeking to progressively advance gender representation in the succession to traditional leadership positions".

⁷⁸ *Traditional Leadership and Governance Framework Act* 41 of 2003 s 3(2)(b): "At least a third of the members of a traditional council must be women".

⁷⁹ Bennett *Customary Law in South Africa* 166.

⁸⁰ See Weeks 2011a *SA Crime Quarterly* 6, where it is argued that this affects the development of living customary law itself, as women will not be able to contribute in these courts.

⁸¹ See s 3(1)(a)(ii) of the *Traditional Courts Bill* [B1-2012].

⁸² See s 3(1)(a)(iii) of the *Traditional Courts Bill* [B1-2012].

- in the application of the act, there is a need to recognise the existence of systemic unfair discrimination and inequalities, particularly in respect of gender, age, race, as a result of past unfair discrimination, brought about by colonialism, apartheid and patriarchy;⁸³ and
- during proceedings, women should be afforded full and equal participation in the proceedings in the same way as men are.⁸⁴

Authors such as Oomen⁸⁵ contend that in some courts women can only be witnesses or silent listeners whilst in other courts they can represent themselves. Much as this might be the case, it cannot be taken to be the general practice, but rather the exception in so far as the treatment of women is concerned. Women are generally regarded as inferior to men and the general opinion is that they belong in the kitchen.⁸⁶ In some societies the treatment of women goes beyond discrimination.⁸⁷

Against such a background the framers of the Bill should have considered the representation of women more carefully. It would have been judicious to have a provision to the effect that the Minister can make regulations on representation. However, this has not been done. The Constitutional Court has echoed the view that the legislature is in the best position to safeguard rights that are violated and impugned.⁸⁸ Therefore, the legislature is in a position to remedy the previous injustices. Failure to remedy this is an abdication of its duties.

The issue of training also becomes important at this point as the presiding officers need to know the trend in so far as human rights have become an international

⁸³ See s 3(2)(b) of the *Traditional Courts Bill* [B1-2012].

⁸⁴ See s 9(2)(a)(1) of the *Traditional Courts Bill* [B1-2012].

⁸⁵ Oomen *Chiefs in South Africa* 207.

⁸⁶ Matavire holds that appointing a female to chieftainship in the name of human rights in cultures that view it as a taboo would not make the female a legitimate leader as a leader has to be accepted by the locals. This is indicative of the kind of polarity that exists in most societies. See Matavire 2012 *IJHSS* 220.

⁸⁷ See Access to Justice Blog 2012 <http://ma2j.wordpress.com/2012/03/26/traditional-courts-bill-sparks-controversies-in-south-africa/> for the following: "An example of the attitude that some traditional leaders might have towards women is a story from Prudhoe village, where an eight-month pregnant woman tried to claim damages from the man who made her pregnant and then abandoned her. The tribal court decided that she was just speculating with the good name of the man. Also the court said that the man's father is rich and important and it is not desirable for the community to 'pull their family name in the mud. At the end, instead of being given relief, the pregnant woman was sentenced to corporal punishment."

⁸⁸ *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC). The court went on to note that "The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable of our society."

concern. It is submitted that it is a potential travesty of justice that the Minister is given the discretion to decide who to assign for training and when to train these traditional leaders.⁸⁹ Kings, queens, chiefs, headmen and headwomen are leaders in society who do an essential job for the judicial system, which would otherwise have been too congested. It is submitted, therefore, that there is a need for training so that their activities are not marred by the issues of gender imbalance. It is interesting to note, though, that the Department of Justice and Constitutional Development actually made submissions that traditional leaders and all officers in the courts should undergo compulsory human rights and social context training.⁹⁰ The legislature, deliberately or ignorantly, or both, decided not to include this recommendation, but to give the Minister a discretion in this regard.

5.2 *The hierarchy of the courts*

The Bill does not classify the traditional courts as part of the mainstream courts or as other courts in terms of the *Constitution*.⁹¹ Regardless of the foregoing, it is a constitutional requirement that courts should function in terms of national legislation and that their rules and procedures must be provided for in terms of national legislation.⁹² It is, therefore, necessary that the Bill has to be aligned with the above constitutional requirement.

The traditional court structure has always been hierarchical. Harper labels it a "hierarchy of problem-solving fora" which is organised and clear in structure.⁹³ In African societies there have always been family courts where disputes usually arose first. Hierarchically, the court of the headmen is usually the court of first instance,⁹⁴ but the Bill as it stands does not recognise the courts of headmen.⁹⁵ It is clear that

⁸⁹ See s 4(1) of the *Traditional Courts Bill* [B1-2012].

⁹⁰ See DJCD 2009 http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/DOJ_report_2009.pdf 3.1.3.

⁹¹ S 166(e) of the *Constitution* recognises "any other courts established or recognized in terms of an Act of Parliament".

⁹² See s 171 of the *Constitution*.

⁹³ Harper *Customary Justice* 19. She also notes that disputes which cannot be solved in the lower levels of dispute resolution are then taken up the hierarchical chain.

⁹⁴ SALC *Report on Traditional Courts* 5.

⁹⁵ S 4(4) of the *Traditional Courts Bill* [B1-2012] provides only for the designation of a headman or headwoman to serve as an alternative presiding officer in the event the real presiding officer being unavailable, and only at the request of a king or queen or senior traditional leader.

headmen are closer to the rural people and that these courts would potentially relieve the court of the chief of smaller matters. It is argued that there is no legal basis for the disregard of the courts of headmen as they have always been functional and also serve to secure a chain of authority in providing an appeal system.

Other African countries with similar legislations that deal with traditional justice systems recognise a clear system of hierarchy. It is not simply assumed that there is a system of hierarchy – it is actually entrenched. For instance, Matavire notes that in Zimbabwe there are three levels of courts, namely the family court, the headmen's courts (where an appeal can lie from the family court) and also the chief's court, which is the highest traditional court.⁹⁶

South Africa should similarly recognise the classification of traditional courts as this structure brings more transparency and a formalised structure. If the Bill's intentions are to formalise these courts, then practices that are functional and necessary should not just be discarded without a legal basis to justify such an approach. This classification is functional and also promotes independence and accountability.⁹⁷

5.3 Appeals

Provision for appeal is important for any court structure. It goes without saying that a system of hierarchy of courts is necessary for appeals to be effective. The Bill provides that an appeal on a decision of the traditional court lies with the Magistrates' Court which has jurisdiction.⁹⁸ As argued above, the absence of a provision to the effect that an appeal can lie from the headman/headwoman's court to the chief's court suggests that the courts of headmen/headwomen are not recognised in the Bill. It is submitted that this omission on the part of the legislature has the effect of destroying the institution of traditional leadership as it has been known.

⁹⁶ See Matavire 2012 *IJHSS* 219.

⁹⁷ SALC *Report on Traditional Courts* 5, where the Commission notes the following: "Thus, it is proposed that headmen's courts be recognised as a specific level of court at the bottom of the hierarchy of customary courts and given the same jurisdiction as chiefs' courts".

⁹⁸ See s 13(1) of the *Traditional Courts Bill* [B1-2012].

The *Traditional Leadership and Governance Framework Act* recognises headmen and headwomen,⁹⁹ whilst the Bill does not. The consequences of such a flaw become apparent if regard is had to the findings of Tshehla in a monograph on the Limpopo Province. He notes that within that province there are 192 traditional authorities headed by chiefs and 1 742 headmen that serve under the chiefs.¹⁰⁰ Taking this as an example, the failure to recognise courts of headmen/headwomen would mean that thousands of people under the 1 742 headmen would have to travel large distances to the 192 chiefs operating in the area. This dire situation would be prevented if the headmen/headwomen's courts were recognised, which also would mean that appeals from the headmen/headwomen's courts would lie with the chief's courts, thereby relieving them of the pressure of being a court of first instance.

By way of comparison, the *Customary Courts Act* of Botswana provides a unique system of appeal. The courts are divided into lower and higher customary courts. A person can appeal from the lower customary court to the higher customary court.¹⁰¹ There is also a customary court of appeal which is of similar status to the Magistrates' Court.¹⁰² The last forum to appeal to would be the High Court.¹⁰³ In Zimbabwe the appeal structure partially follows the Botswana system, but for the difference that there are primary and community courts.¹⁰⁴ Thus, one can appeal from the primary to the community court. However, Zimbabwe does not have a customary court of appeal, with the result that appeals are taken from the community courts to the Magistrates' Court within a particular province.¹⁰⁵ From the Magistrates' Court a further appeal can be made to the High Court.¹⁰⁶

In Namibia there are three stages of appeal. The first one is to a court of appeal which is also a community court, in other words, a community court of appeal.¹⁰⁷ An appeal lies with the Magistrates' Court only after one has exhausted one's rights of

⁹⁹ See s 11 of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

¹⁰⁰ Tshehla *Traditional Justice in Practice* 11.

¹⁰¹ See s 42(1) of the *Customary Courts Act* Proc 19 of 1961.

¹⁰² S 42(2) of the *Customary Courts Act* Proc 19 of 1961.

¹⁰³ S 42 (3) of the *Customary Courts Act* Proc 19 of 1961.

¹⁰⁴ See s 10(1)(a) and (b) of the *Customary Law and Local Courts Act* 2 of 1990.

¹⁰⁵ S 24(1) of the *Customary Law and Local Courts Act* 2 of 1990.

¹⁰⁶ S 24(6) of the *Customary Law and Local Courts Act* 2 of 1990.

¹⁰⁷ See s 2(5) of the *Community Courts Act* 10 of 2003.

appeal within the community courts, if they exist.¹⁰⁸ The Magistrates' Court must be that of the province within which the traditional community is situated.¹⁰⁹ The rationale for this is probably the fact that the Magistrates' Court is within the province where a certain customary law is practised. From the Magistrates' Court a further appeal lies at the High Court.¹¹⁰

From the discussion above it is apparent that a legally sound and organised structure of appeal is dependent on the existence of a structured hierarchy of courts. In all the above foreign legislations there are at least two levels of court in the traditional justice systems that are specifically provided for. As a result, unless a case originates from the chief's court, it will go through one level of appeal before reaching the Magistrates' Court. It is submitted that the framers of the South African Bill did not show appreciation for a fundamental level of court in the form of headmen/headwomen's courts.¹¹¹ This undoubtedly affects the structure of appeals as it has been known in traditional justice systems.

6 Concluding remarks

The drafting of the *Traditional Courts Bill* was supposed to be a hallmark when it comes to traditional justice regulation. The legislature had the monumental task of redefining and shaping traditional justice systems in line with the new constitutional dispensation.¹¹² Sadly, the Bill does not achieve this. The people who are supposed to be governed by the Bill reject it outright;¹¹³ the framers of the Bill have also fallen short of addressing contentious issues such as gender representation, which is specially provided for in both the *Constitution* and the *Traditional Leadership and Governance Framework Act*. Its future is still uncertain, as there is speculation that

¹⁰⁸ S 26(1) of the *Community Courts Act* 10 of 2003.

¹⁰⁹ S 24(1) of the *Community Courts Act* 10 of 2003.

¹¹⁰ S 24(6) of the *Community Courts Act* 10 of 2003.

¹¹¹ See Weeks 2011b *SA Crime Quarterly* 33, who argues that the Bill's recognition of only the chief's court is akin to the manner in which the *Black Administration Act* initially ignored the other levels of courts like the family, clan and headmen's court.

¹¹² Weeks 2011a *SA Crime Quarterly* 4.

¹¹³ Mkhwanazi 2013 <http://www.thenewage.co.za/mobi/Detail.aspx?NewsID=90037&CatID=1007>.

the Bill might be discarded altogether.¹¹⁴ Nonetheless, whether now or in the near future, the obligation on the legislature to align traditional justice systems with the new constitutional dispensation will not be extinguished.

Below follow some of the issues that have been identified as in need of being revisited if the proposed legislation is to achieve its goals. They are ascertainment, legal representation, jurisdiction, gender, hierarchy of courts, and appeals. They are dealt with in turn and a specific recommendation is made in respect of each of them.

On ascertainment, the Bill only gives direction when there are two systems of customary law that are in existence. It does not guide as to how to settle a dispute regarding the system of customary law applicable or the customary law to which the persons have their closest connection. Without comprehensive and elaborate provisions on ascertainment, it is quite possible that parties can dispute the existence of a custom. As indicated earlier, the legislature could follow the wording of the Botswana and Zimbabwean legislations. This would ensure that the court first hears the customary law or rule that is in issue, after which parties are to submit their understanding on the rule. The court could also be required to consult reported cases, text books, opinions in writing or submitted orally and any other source that might shed light on a rule or custom that is in dispute. The court should also have the final say when it comes to any opinion consulted in the ascertainment of any rule or custom. The importance of the presiding officer's having discretion to decide on the opinions consulted is to guard against people frivolously arguing that they are not bound by a certain traditional or customary practice. It is also submitted that the legislature could include a clause that requires the traditional leaders also to consider living customary law. This can be done by way of representations by the parties, assessors from within the community, or senior community members, to ascertain the proof of any development in customary law.

¹¹⁴ Mtyala 2014 <http://www.timeslive.co.za/thetimes/2014/02/28/anger-as-traditional-courts-bill-jettisoned>; Anonymous Traditional Courts Bill not withdrawn: justice department <http://www.timeslive.co.za/politics/2014/02/28/traditional-courts-bill-not-withdrawn-justice-department> [date of use 01 May 2014].

On the issue of jurisdiction, there is a difficulty in having a traditional court that has both criminal and civil jurisdiction and yet denies legal representation. It has been found by the High Court that the lack of legal representation in traditional courts that are based on customary law is contrary to the constitutional requirements.¹¹⁵

The argument is that:

s 35(3) does not limit this right to an accused person appearing in any particular court. The only requirement is that he or she must be "an accused". The protection afforded an accused person is also extended to "every accused" and is not limited to only certain categories or classes of accused persons.¹¹⁶

The *Constitution* further provides for traditional courts to continue functioning and exercising their jurisdiction provided that there is consistency with the *Constitution*.¹¹⁷ It is therefore submitted that if the provision that denies legal representation is to be kept intact, then the jurisdiction of traditional courts should be limited to civil cases and not criminal cases. It is further submitted that it would bring unfair results for a conviction in a traditional court to count as *autrefois convict* when there has been no legal representation, considering the fact that traditional courts are not recognised as mainstream courts.

Furthermore, the *Constitution* prohibits discrimination on the grounds of gender whilst the *Traditional Leadership and Governance Framework Act* sets the threshold for the representation of women in a traditional council. On the whole, however, the Bill falls short of clearly outlining substantive methods through which imbalances in gender would be addressed.¹¹⁸ It is submitted that if the Bill is to avoid being found to be unconstitutional based on its treatment or lack of treatment of the issue of gender, the legislature should include provisions that deal with the role of women in the traditional courts and how they should be represented.¹¹⁹

¹¹⁵ *Mhlekwana v Head of the Western Transvaal Regional Authority; Feni v Head of The Western Transvaal Regional Authority* 2001 1 SA 574 (Tk) 618.

¹¹⁶ *Mhlekwana v Head of the Western Transvaal Regional Authority; Feni v Head of The Western Transvaal Regional Authority* 2001 1 SA 574 (Tk) 618.

¹¹⁷ See point 16(1) of the Transitional Arrangements in the *Constitution*.

¹¹⁸ Williams and Klusener argue that the Traditional Courts Bill will impact on women more than any other sector of the population. See Williams and Klusener 2013 *SAJHR* 277.

¹¹⁹ As has been indicated above, s 3(2)(b) of the *Traditional Leadership and Governance Framework Act* 41 of 2003 requires a third of the members in a traditional council to be women.

Harper is of the opinion that training programmes are needed for traditional structures to maintain their relevance and perform their role more effectively.¹²⁰ Therefore, if change is to come in the manner in which traditional justice systems view women, efforts must be made to realise that objective. The training of traditional leaders should be made compulsory and the clauses which give the Minister of Justice a discretion to decide who goes for training should be removed. The legislature should adopt the recommendation on training given by the Department of Justice and Constitutional Development, which required traditional leaders and officers of the courts to undergo compulsory human rights and social context training.¹²¹

When it comes to the issue of the hierarchy of courts, it must be noted that point 16(1) of the 6th Schedule of the *Constitution* (Transitional Arrangements) provides that every court, including courts of traditional leaders existing when the new *Constitution* took effect, would continue to function.¹²² The failure to recognise the courts of headmen/headwomen is a flaw that goes against the above mentioned arrangement. It also means that headmen/headwomen are not recognised as traditional leaders as they were recognised in the *Certification* judgment¹²³ and the *Traditional Leadership and Governance Framework Act*.

In respect of appeals, the legislature could first recognise the courts of headmen and headwomen such that there is a system of hierarchy within the structures of traditional justice. This also gives the people options and choices as to which forum to make use of. Subsequently, the courts of the chief would then serve as a forum for appeals from the headmen/headwomen's courts. From there on there could be customary courts of appeal for every province which is on the same level as the magistrates' courts. The presiding officers in these customary courts of appeal could be made up of either kings/queens or chiefs who preside within the jurisdiction of

¹²⁰ See Harper *Customary Justice* 45, where it is argued that customary leaders must be the targets of reform strategy because they can serve as "gatekeepers to rights protection or potential vehicles of social change."

¹²¹ See DJCD 2009 http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/DOJ_report_2009.pdf 3.1.3.

¹²² See DJCD 2009 http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/DOJ_report_2009.pdf 3.1.3.

¹²³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) paras 193-194.

the specific province. Such an arrangement would help in the preservation of customary law. This would ensure that traditional courts have their own unique structure and that the traditional leaders become custodians of custom in their societies (unlike when a magistrate decides on custom). From the customary court of appeal a further appeal would go to the High Court.

"After finding the lines and drawing the parallels, it is concluded that the framers of the Bill must reconsider these issues along the lines in which they are addressed in the countries with which comparisons have been drawn here. Without a reconsideration of the issues, the Bill will still be met with criticism even from those it is meant to regulate, and could potentially result in various constitutional challenges and litigations."

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LIST OF ABBREVIATIONS

AHSI	African Human Security Initiative
DJCD	Department of Justice and Constitutional Development
IJHSS	International Journal of Humanities and Social Science
LRC	Legal Resource Centre
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
Windsor YB Access Just	Windsor Year Book of Access to Justice